SUPREME COURT, U. S.
No. 863
FILED
FEB 13 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1966

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of the State of California

Brief in Opposition to Motion to Dismiss or Affirm

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1. Appellees Err in Ignoring the Constitutional Purposes Underlying the Prohibition Against State Taxation of Exports in the Import-Export Clause. Appellees Also Fail to Provide any Answer to the Conflict Between the Courts of New York and California in Their Interpretations of the Import-Export Clause; The Conflict Exists and Should Be Resolved by This Court.

Appellees completely ignore appellant's detailed analysis of the history and purposes which underlie the constitutional prohibition against state taxation of exports. (Jurisdictional Statement, pp. 8-10). Appellees try instead to characterize the case of *Swan & Finch Co. v. United States*, 190 U.S. 143, 47 L.Ed. 984 (1903), as a constitutional authority resting upon the Import-Export Clause, and suggest that it governs this case. As pointed out in the Jurisdic-

tional Statement (p. 12), the *Swan & Finch Co.* case involved only a *statutory tax exemption* for the remission of an import duty. The Supreme Court there discussed the purposes of the statutory exemption, and properly based its decision upon these purposes. 190 U.S. at 146. Nowhere, however, did the Court analyze or even allude to the purposes of the *constitutional* prohibition against state taxation of exports, and therefore the decision is not an apposite precedent in this case.

In fact, Congress actually reversed the result produced by the *Swan & Finch Co.* case by subsequently providing (in Section 630 of the Internal Revenue Code of 1932, C. 96, 48 Stat. 256, now 26 U.S.C. 4221) that sales of fuel supplies for ships' stores "*shall be held to be exported.*" (Emphasis added).[1] If *Swan & Finch Co.* were a binding constitutional precedent, a mere congressional statute would not have been sufficient to overturn it; yet this Court found in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84 L.Ed. 840 (1940), that such action was within the legitimate province of Congress.

We should also point out parenthetically that the final decisions in *West India Oil Co. v. Sancho*, 108 F.2d 144 (5th Cir. 1939), *aff'd. on other grounds*, 311 U.S. 20, 85 L.Ed. 16 (1940), and *National Sugar Refining Co. v. United States*, 161 F. Supp. 606 (1958), specifically left open the question of interpretation of the Import-Export Clause. The California Supreme Court in this case recognized this fact, and these cases should not therefore be regarded as applicable precedents.

Equally groundless is appellees' further assertion that *Gulf Oil Corporation v. McGoldrick*, 281 N.Y. 647, 22 N.E.2d

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1. Ships' stores are also classified as exports under the Export Control Act, February 26, 1949, C. 11, 63 Stat. 7, (50 U.S.C. App. 2021 et seq.), and the current Federal Regulations, 15 C.F.R. 371.13.

480 (1939), *as modified*, 282 N.Y. 612, 25 N.E.2d 392 (1940),[2] is not a pertinent authority under the Import-Export Clause. The New York Court of Appeals there stated unequivocally that it was deciding the case, *inter alia*, under "Article I, Section 10, Clause 2 . . . of the United States Constitution, . . ." 282 N.Y. 612. Since the fuel oil there was first imported, processed in bond, and then re-exported as a ships' store, the New York Court of Appeals regarded it as immune from tax as *both an import and an export*. Certainly there is no basis for appellees' assertion that the New York Court of Appeals had in mind only imports. The lower appellate court, which was affirmed *per curiam* by the New York Court of Appeals, clearly viewed fuel oil sold as ships' stores as an "export." It stated:

> "We hold that it is a legitimate exercise of the power of Congress over foreign trade to provide for the segregation of imports so that they may be processed and *re-exported. It is also within the power of Congress reasonably to define the word 'exports' to include ships' stores.*" (Emphasis added). 256 App. Div. 207, 212, 9 N.Y.S.2d 544, 548 (1939).

Nothing in the opinion of the New York Court of Appeals suggests that it did not also view the fuel oil as an export.

2. Appellees Fail to Show That a Tax on Fuel Oil Sold to Vessels for Consumption While Engaged in Carrying Exports Is Not, in Economic Effect, a Prohibited Burden on the "Process of Exportation." They Propose an Incorrect Test Which Is Not Supported by Supreme Court Decisions.

Appellees err in attempting to restrict the constitutional protection of exportation only to those indirect taxes which are the equivalent of direct taxes on exports themselves.

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2. The unofficial citation of this case which appears at 25 N.E.2d 392 is incomplete. Reference is made to the Jurisdictional Statement, p. 8.

Such a test is too narrow and is not supported by the relevant authorities. In *Brown v. Maryland,* 12 Wheat. 419, 6 L.Ed. 678 (1827), the Supreme Court struck down a flat-fee occupation tax levied upon importers. It was not a tax upon the articles of import and it bore no relation to the volume or the value of the goods handled. In no manner was the tax the equivalent of a direct tax on any particular item of import or export. *If appellees' test were correct the tax would have been valid.* It was plain, however, that this was not the test applied by the Court. The Court objected to the tax because it was a burden which would ultimately and inescapably cause an increase in costs which the importer would either absorb himself or pass on to his customers. For this reason the Court rejected the tax as a burden on importation. *Brown v. Maryland, supra,* 12 Wheat. at 444. See also *Crew & Levick Co. v. Penn.,* 245 U.S. 292, 62 L.Ed. 295 (1917).

A further example of the incorrectness of appellees' contention is the case of *United States v. Hvoslef,* 237 U.S. 1, 59 L.Ed. 813 (1915), discussed at length in appellant's Jurisdictional Statement (pp. 15, 18). A tax on the sale of a lease for a complete ship, carrying a shipload of goods, cannot be logically tied to any particular item of cargo. Assignment of the burden of such a tax to each item of cargo would obviously be difficult. The Supreme Court did not boggle at this prospect; the tax was held to be a burden on exportation. (*United States v. Hvoslef, supra,* 237 U.S. at 17-18). The economic effect of a tax on the sale of fuel oil cannot be distinguished. See also *New York and C. Mail SS Co. v. United States,* 125 Fed. 320, *aff'd on this ground,* 200 U.S. 488, 50 L.Ed. 569, holding tax on manifests of cargo for foreign ports unconstitutional; and concurring opinion of Justice Douglas in *Joseph v. Carter and Weekes*

Stevedoring Co., 330 U.S. 422, 444-445, 91 L.Ed. 993 (1947), suggesting gross receipts tax on stevedoring activities in loading export cargo is part of "exporting process."

Appellees are also misguided in their citation of federal taxes which supposedly demonstrate that individual states may impose economic burdens on the "process of exportation." (Motion to Dismiss, pp. 14-15) The tonnage duties and "light money" duties on certain vessels entering the United States from foreign ports are expressly authorized by the United States Constitution. Article I, Section 8, Clauses 1 and 3. The individual states are, conversely, expressly denied this same power. Article I, Section 10, Clauses 2 and 3. The social security taxes, also mentioned by appellees, derive from the power given to the Federal Government by the Constitution to regulate and to tax foreign commerce. Article I, Section 8, Clause 3. The states have no such power and they may not claim co-extensive power to tax. *E.g., Joseph v. Carter and Weekes Stevedoring Co., supra.*

3. Appellees Fail to Meet Appellant's Contention That Sales of Fuel Oil to Vessels Registered Outside California Are Exposed to Multiple Burdens and That These Sales May Not Therefore Be Taxed by California.

In the Jurisdictional Statement, appellant pointed out that delivery of fuel oil to vessels of foreign registry could, because of the "law of the flag doctrine," be subjected to taxation just as if the fuel had been delivered into the territory or jurisdiction of the state of registry. In view of this possibility, appellant contended that the sales of fuel oil to such vessels raised a unique opportunity for double taxation, and therefore the State of California should be prohibited from taxing the sale. (Jurisdictional Statement, pp. 19-21). Appellees offer no answer to this contention.

Without benefit of citation of authority, appellees do no more than contend in substance that appellants are wrong. (Motion to Dismiss, p. 17) Appellant's lengthy analysis of the authorities which establish that the state of the vessel's registry retains jurisdiction over the persons and property on board the vessel, including the power to tax, is in effect unanswered.

Appellees' citation of *Foppiano v. Speed,* 199 U.S. 501, 50 L.Ed. 288 (1905) is inapposite. The vessel involved there operated exclusively on inland waters, as distinguished from the high seas, and the case is therefore distinguishable. The "home port" doctrine of *Hays v. Pacific Mail SS Co.,* 58 U.S. (17 How.) 956, 15 L.Ed. 254 (1855), and the territorial extension idea underlying it, has never applied to vessels engaged only in interstate commerce over inland waters. Hence, appellees are inaccurate in suggesting that the *Foppiano* case has any bearing on taxation of sales made to vessels plying the high seas in either intercoastal or foreign commerce.

Appellees are again wrong in stating that a state tax is invalid under the Commerce Clause *only if* the tax is in fact duplicated in another state. Appellant anticipated this argument in its Jurisdictional Statement, and drew this Court's attention to the numerous Supreme Court authorities which are squarely in opposition to appellees' argument. (Jurisdictional Statement, pp. 20-21) These authorities, directly in point, are erroneously ignored by appellees.

4. Appellees Fail to Justify the Local Tax Discrimination Against Domestic Fuel Permitted by the Decision Below; This Discrimination Is Unwarranted and Should Be Reviewed by the Court.

The federal tax exemption statute construed in this case (26 U.S.C. 3451, cited in App. B, Jurisdictional Statement) was adopted by Congress for a clearly stated purpose, namely, to help domestic tradesmen compete with merchants in foreign countries in the ships' stores trade. (Jurisdictional Statement, pp. 23-24). This help was given by exempting local merchants from taxation which obviously did not burden foreign merchants. The tax exemption was general in its terms, extending to ships' stores of every variety. Nothing in its legislative history or its actual language lays any basis for an exclusion of domestically produced articles from its protection.

Appellees concede that under *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 84-L.Ed. 840 (1939), imported fuel oil which is refined in bond and sold as ships' stores is immune from local taxation. They assert, however, that fuel of domestic origin is fair game for local taxation.

Appellees seek support for their argument that Congress intended this discriminatory treatment solely in the fact that there is no federal excise tax on domestically produced oil. They argue that the only commerce intended to be regulated by this federal exemption is "commerce carried on by the oil companies in bringing in foreign oil for refining in the United States under federal bond." (Motion to Dismiss, p. 20). This argument misconcieves the meaning of the statutory exemption. The exemption is not a fuel oil exemption; it is a ships' supplies exemption. If there were no federal excise tax on *any article sold for use as ships' supplies,* the argument might be valid; but there are now, and have been at all times since the adoption of the statute construed in the *Gulf Oil* case, federal excise taxes on com-

modities of domestic origin which constitute ships' supplies (*e.g.*, lubricating oil—Revenue Act of 1932, Sec. 601 (c)(1), C. 209, 47 Stat. 260, now 26 U.S.C. 4091). These are all exempt from federal tax when sold as ships' supplies (26 U.S.C. 4221 (a)(3)).

Nothing in the language of the statutes or the debates or reports of Congress on these statutes gives any support to an interpretation which requires discrimination against products of domestic manufacture, and common sense is certainly against it.

Respectfully submitted,

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No. 863. Decided February 27, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.